89-892

Supreme Court, U.S.
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No. 89-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOSEPH MICHAEL TRAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether denial of a pretrial motion to dismiss an indictment is a collateral order subject to interlocutory appellate review when that motion was based upon violation of the Grand Jury Clause resulting from the prosecutor's infringement of the grand jury's independence by way of incomplete, erroneous and misleading instructions.

PARTIES IN COURT BELOW

In addition to the present Petitioner and Respondent, the following individuals were parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed:

1. Robert Singer, a/k/a Paul
2. Steven Martin Wolosky, a/k/a Michael Wayne Horton
3. Mark Stephen Gayer, a/k/a Dennis Kevin Cleary

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The order of the Court of Appeals for the Ninth Circuit dismissing the appeal in this case is unreported. That order is reprinted at Appendix A (App. 1a-2a) to this petition.

JURISDICTION

The order of the Court of Appeals was entered on August 11, 1989. The Court of Appeals denied the timely petition for rehearing on October 2, 1989 (Order reprinted at Appendix B (App. 3a)). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition concerns the construction and application of the Grand Jury Clause of the Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger... .

U.S. Const. amend. V.

This petition also concerns the con-

struction and application of the following provisions of 28 U.S.C. §1291:

> The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where direct review may be had in the Supreme Court.

28 U.S.C. §1291.

STATEMENT OF THE CASE

On March 15, 1988, petitioner Joseph Michael Travis ("Travis") and eight co-defendants were charged in a four count indictment with offenses related to importing and distributing marijuana. The indictment charges conspiracy to import and importation of marijuana in violation of 21 U.S.C. §§952, 963 (Counts I and II) and conspiracy to possess with intent to distribute and possession with intent to distribute marijuana in violation of 21 U.S.C. §§841(a)(1), 846 (Counts III and IV). Counts II and IV each also carry an

aiding and abetting allegation (18 U.S.C. §2). Travis is named in all four counts of the indictment.

On March 14, 1989, prior to issuance of the indictment, Travis submitted to the government a demand that two instructions be read to the grand jury prior to a vote on whether to indict the defendants. The first request was that the grand jury be instructed that "[m]ere proof of the existence of a buyer-seller relationship is not sufficient evidence to charge the buyer as a member of the seller's conspiracy." The second requested instruction was as follows:

> A government agent who pretends to be a member of a criminal conspiracy is not a member, as a matter of law. Accordingly, possession of contraband by such a government agent cannot be attributed to others who are claimed to be members of the conspiracy.

On November 23, 1988, the trial

court issued an order requiring the government to produce to defendants the transcripts of the instructions given to the grand jury. The government complied with this order on December 5, 1988.

The transcript demonstrates that the prosecutor neither instructed the grand jury on the substance of the instructions submitted by Travis, nor provided the grand jury with any instructions concerning the necessary elements to authorize a charge of either importation of marijuana or possession of marijuana with intent to distribute. In addition, the prosecutor instructed as follows with regard to the law of aiding and abetting:

> MR. LAWRENCE: It is also -- the other thing that we should be aware of is that what is charged is, and what is part of the charge is, aiding and abetting the distribution.
>
> That means that if the agent -- excuse me -- if the defendants take actions which caused the marijuana

> to be imported, they aid and abet the importation even if the actual importation is done by the agents.
>
> If it is caused by the co-conspirators or in furtherance of the conspiracy, then that is aiding and abetting the importation.

On December 9, 1988, Travis filed a motion to dismiss the indictment due to the prosecutor's incomplete, erroneous and misleading instructions to the grand jury. Specifically, Travis challenged the prosecutor's failure to instruct the grand jury either on the necessary elements of importation of marijuana or possession of marijuana with intent to distribute, or on the substance of the instructions submitted by the defendants, and the prosecutor's misstatement of law with regard to aiding to abetting.[1]

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[1] It should be noted that it was uncontested that the physical act of importation was performed solely by federal law enforcement personnel.

Travis asserted that the prosecutor's misconduct in instructing the grand jury significantly infringed the grand jury's independence and thereby violated his right, guaranteed by the Grand Jury Clause, not to be tried except upon indictment by an independent and informed grand jury.

Travis further asserted that dismissal was appropriate as an exercise of the trial court's supervisory powers under this Court's decision in Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369 (1988). The motion also requested that the trial court enter an order pursuant to Fed. R. Crim. P. 6(e) permitting inspection by the defense or in-camera inspection by the court of the evidence presented to the grand jury if there was any question that the defendant was prejudiced by the prosecu-

tor's erroneous and incomplete instructions.

The trial court denied Travis' motion in an oral ruling on December 21, 1988 (Transcript of order reprinted at Appendix C (App. 4a-10a)). Specifically, the trial court held that it was not error for the prosecutor to refuse to give the proposed instructions and that the aiding and abetting instruction was not erroneous on its face. The trial court further held that, even if the prosecutor erred, his actions did not constitute the type of misconduct which the trial court had power to correct. The trial court did not order that the defendants be permitted to inspect the evidence presented to the grand jury, and there is no indication in the record that the trial court itself reviewed such evidence prior to denying the motion.

Travis filed his notice of appeal on December 29, 1988. His appeal subsequently was consolidated with those of three of his co-defendants who had joined his motion in the trial court.[2]

Following submission of the defendants' consolidated brief, the government moved to dismiss the appeal on the ground that the trial court's denial of the motion to dismiss was a non-appealable interlocutory order under this Court's decision in Midland Asphalt Corp. v. United States, ____ U.S. ____, 109 S.Ct. 1494 (1989). The Court of Appeals

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[2] It should be noted that the appeal in this case also involved a second challenge to the prosecutor's conduct in the grand jury, that being his failure to present known exculpatory evidence to the grand jury. The decision of the Court of Appeals denying that portion of the appeal was not challenged in Travis' petition for rehearing, and the interlocutory appealability of such an issue is not presented in this petition.

granted the motion without discussion, citing only Midland Asphalt and its own prior decision in United States v. Moreno-Green, 881 F.2d 680 (9th Cir. 1989). Travis' petition for rehearing was denied without discussion.

REASONS FOR ALLOWANCE OF THE WRIT

This is the paradigmatic case for resolution of an important federal question, as yet unaddressed by this Court. The question presented not only has given rise to two squarely conflicting modes of analysis among the courts of appeal, but has also revealed an apparent conflict between prior decisions of this Court. The lower courts have reached widely disparate conclusions concerning whether, and if so when, a prosecutor's incomplete, erroneous or misleading instructions to the grand jury act to deprive a

criminal defendant of his right under the Grand Jury Clause to be tried only upon indictment by a grand jury. While panels of the Fifth and Ninth Circuits have analyzed whether particular defective instructions significantly infringed upon the independence of the grand jury, other courts have held simply that the prosecutor's grand jury instructions are not subject to judicial review.

The conflicting analyses of the various courts of appeal in turn reflect an apparent conflict between prior decisions of this Court. On the one hand are those decisions, exemplified by United States v. Dionisio, 410 U.S. 1, 16-17 (1973), and Stirone v. United States, 361 U.S. 212, 218 (1960), which emphasize the requirement of grand jury independence as a precondition to compliance with the Grand

Jury Clause. On the other hand are those decisions, exemplified by Costello v. United States, 350 U.S. 359 (1956), which hold in broad language that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on its merits." Id. at 363.[3]

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[3] Although the court of appeals' terse order is singularly unenlightening concerning its reasons for dismissal of the appeal (see App. 1a-2a), it can be assumed that the court did not base its decision on the ground that alleged violations of the Grand Jury Clause are not proper subjects of interlocutory review. This Court settled the pretrial reviewability of such allegations in Midland Asphalt v. United States, 109 S.Ct. 1494, 1499-1500 (1989). It thus reasonably may be concluded that the court of appeals' order must be based upon a belief that the Grand Jury Clause is not violated when the prosecutor's incomplete, erroneous or misleading instructions undermine the independence of the grand jury.

I.

THE COLLATERAL ORDER DOCTRINE AUTHORIZES INTERLOCUTORY REVIEW OF GRAND JURY CLAUSE CLAIMS THAT THE PROSECUTOR'S ERRONEOUS OR INCOMPLETE LEGAL INSTRUCTIONS UNDERMINED THE GRAND JURY'S INDEPENDENCE.

In Midland Asphalt Corp. v. United States, ____ U.S. ____, 109 S.Ct. 1494 (1989), this Court held that denial of a motion to dismiss an indictment for alleged violations of Fed. R. Crim. P. 6(e) (grand jury secrecy) is not immediately appealable prior to trial. This Court further held, however, that interlocutory appeal is appropriate under the "collateral order" exception to the final judgment rule where the asserted right is based upon an "explicit statutory or constitutional guarantee that trial will not occur." Id. at 1499. Such a right is found in the Grand Jury Clause. U.S. Const. amend. V; see Midland Asphalt, 109

S.Ct. at 1499. To impinge upon that right, the claimed defect must be "so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment." Id. at 1499-1500. That standard is met where a prosecutor's incomplete or erroneous instructions significantly infringe the grand jury's independence.

Implicit in the Fifth Amendment prohibition that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ..." is the guarantee that a grand jury which presents or indicts will be fair and unbiased. This guarantee is important to a person under federal criminal investigation because the purposes of the grand jury are "to provide a fair method for instituting criminal proceedings,"

Costello v. United States, 350 U.S. 359, 362 (1956), to serve "as a protector of citizens against arbitrary and oppressive governmental action," United States v. Calandra, 414 U.S. 338, 343 (1974), and to assure the "protecting of citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 686 (1972).

These purposes make it necessary that the grand jury be "independent and informed." Wood v. Georgia, 370 U.S. 375, 390 (1962). "Under the constitutional scheme, the grand jury is not and should not be captive to any of the three branches." United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir.), cert. denied, 434 U.S. 825 (1977). The Grand Jury Clause "presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' ..., whose mis-

sion is to clear the innocent, no less than to bring to trial those who may be guilty." United States v. Dionisio, 410 U.S. 1, 16-17 (1973), quoting Stirone v. United States, 361 U.S. 212, 218 (1960).

The constitutional requirement of an independent grand jury thus is violated where an indictment results from significant infringement of that independence by the prosecutor. See, e.g., Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 2376 (1988), United States v. Larrazolo, 869 F.2d 1354, 1357-58 (9th Cir. 1989). Indeed, "[t]he very purpose of the requirement that [and individual] be indicted by a grand jury is to limit [that individual's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." Stirone, 361 U.S. at 218.

The prosecutor's giving of incomplete, erroneous, or misleading grand jury instructions is one means by which the grand jury's independence may be infringed. See, e.g., Larrazolo, 869 F.2d at 1357-59; United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982)[4] "Clearly the grand jury cannot protect against malicious prosecution if it is not given information which is material

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[4] See also State v. Inthavong, 402 N.W.2d 799 (Minn. 1987) (improper "probable cause" instruction misled grand jury to defendant's prejudice and therefore mandated dismissal); State v. Grose, 387 N.W.2d 182 (Minn. App. 1986) (errors, including prosecutor's erroneous scienter instruction, misleading and incomplete probable cause instruction, and failure to instruct on statute of limitations defense, prejudiced defendant and prevented grand jury from acting independently, thus mandating dismissal); People v. Montalvo, 113 Misc. 2d 471, 449 N.Y.S.2d 377 (Sup. Ct. 1982) (prosecutor's failure to advise grand jury upon request that failure to indict did not bar future reconsideration effectively forced indictment of defendant).

to its determination." United States v. DeMarco, 401 F. Supp. 505, 513 (C.D. Cal. 1975), aff'd, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977). While the grand jury need not be instructed with the same precision as would a petit jury, United States v. Shober, 489 F. Supp. 393, 406 (E.D. Pa. 1979); People v. Calbud, Inc., 49 N.Y.2d 389, 426 N.Y.S.2d 238, 241, 402 N.E.2d 1140 (1980), the prosecutor, as legal advisor to the grand jury, "has an obligation to give the grand jury sufficient information concerning the applicable law 'to enable it intelligently to decide whether a crime has been committed.'" 2 LaFave & Israel, Criminal Procedure §15.05(e) at 328 (1984), quoting Calbud, 426 N.Y.S.2d at 241; see Department of Justice Manual at 9-11.020 ("The prosecutor's responsibility is to advise the grand jury on the

law and to present evidence for its consideration."). See also Larrazolo, 869 F.2d at 1358; United States v. Sousley, 453 F. Supp. 754, 758 n.1 (W.D. Mo. 1978).

Given the grand jury's protective function, the giving of erroneous or incomplete instructions to the grand jury should be considered among the most serious types of prosecutorial misconduct. A grand jury may be presumed to be able to see through a prosecutor's running commentary or badgering of witnesses, see United States v. Sears, Roebuck & Company, 719 F.2d 1386 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984), or to effectively evaluate hearsay testimony, see Chanen, supra. But the grand jury itself could be totally unbiased, carefully fulfill its obligations to examine all of the evidence presented to it and scrupulously follow the instructions

given, yet still fail to serve its protective purpose because, as happened here, it was misled into believing that certain acts were criminal when in fact they were not. See, e.g., People v. Calbud, Inc., supra; cf., United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977) (presentation of perjured testimony to grand jury), cert. denied, 435 U.S. 944 (1978). Under such conditions, the indictment is, in effect, that of the prosecutor rather than the grand jury.

II.

THE CONFLICTING ANALYSES OF DEFECTIVE GRAND JURY INSTRUCTIONS EMPLOYED BY THE FIFTH, EIGHTH, NINTH AND TENTH CIRCUITS MUST BE RESOLVED.

The apparent conflict between this Court's independent grand jury cases and its broad language in Costello has resulted in two directly conflicting analyses being applied by the lower courts in

addressing claims of improper grand jury instructions.

A. Significant Infringement Of Grand Jury Independence Analysis.

One mode of analysis, adopted by certain panels of the Fifth and Ninth Circuits, addresses the issue in terms of whether the prosecutor's defective grand jury instructions significantly infringed the independence of the grand jury. See United States v. Larrazolo, 869 F.2d at 1357-59; United States v. Wright, 667 F.2d at 796; United States v. McKenzie, 678 F.2d 629, 631, 633 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). This line of cases recognizes that instructional defects "do not automatically invalidate an otherwise proper grand jury indictment," Wright, 667 F.2d at 796, but likewise is consistent with this Court's ac-

knowledgment that compliance with the Grand Jury Clause presupposes an independent grand jury. E.g., Dionisio, 410 U.S. at 16-17; see McKenzie, 678 F.2d at 631-32.

B. Facially Valid Indictment Analysis.

A second mode of analysis applied in the courts of appeals relies upon language in this Court's decision in Costello v. United States, 350 U.S. 359 (1956), for the proposition that an indictment, valid on its face, is sufficient to call for trial of the charge on the merits and therefore is not subject to dismissal for grand jury defects such as erroneous or misleading grand jury instructions. Under this analysis, it is irrelevant whether the prosecutor's instructions were erroneous or misleading, or indeed whether the prosecutor in-

structed the grand jury at all. E.g., United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988) (dicta). Because this analysis is redirected to the facial validity of the indictment, likewise irrelevant is the effect of the instructional defects on the grand jury's independence and decision to indict.

This "facially valid indictment" analysis has been applied by panels of the Fifth, Eighth, Ninth and Tenth Circuits. See Zangger, 848 F.2d at 925; United States v. Buchanan, 787 F.2d 477, 487 (10th Cir. 1986); United States v. Kenny, 645 F.2d 1323, 1347 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976); United States v. Slepicoff, 524 F.2d 1244, 1247 (5th Cir. 1975), cert. denied, 425 U.S. 998 (1976); United States v. Addington, 471 F.2d 560,

568 (10th Cir. 1973).

Contrary to these decisions, however, this Court's decisions in Costello and its progeny do not authorize the lower courts to ignore actions of the prosecutor which significantly infringe the grand jury's independence. As the Eighth Circuit held in United States v. Garrett, 797 F.2d 656 (8th Cir. 1986):

> Costello and its progeny only bar challenges to indictments in which an impropriety occurred in the evidence gathering process; they do not bar "challenges to indictments where improprieties occurred within the grand jury process itself."

Id. at 661, quoting United States v. Zielezinski, 740 F.2d 727, 732 (9th Cir. 1984). Moreover, the issue in the Costello line of cases was whether the grand jury properly may indict in light of the allegedly insufficient or incompetent evidence before it rather than, as here, whether the prosecutor's defective

instructions deprived the grand jury of an opportunity to act in an independent and informed manner as is required by the Grand Jury Clause.

There is no apparent reason to conclude that the courts of appeal will soon agree on a general analysis for addressing Grand Jury Clause challenges to defective or misleading grand jury instructions. Each of the conflicting lines of cases rests upon what its proponents view as established and binding rulings of this Court. The differences between these conflicting modes of analysis thus will not soon be overcome absent resolution by this Court.

CONCLUSION

For the reasons stated the petition for a writ of certiorari to the United States Court of Appeals for the Ninth

Circuit should be granted.

Dated: Milwaukee, Wisconsin

November 30, 1989.

Respectfully submitted,

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7119P

APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

vs.

ROBERT SINGER, a/k/a PAUL;
STEVEN MERTEN WOLOSKY, a/k/a
MICHAEL WAYNE HORTON;
MARK STEPHEN GAYER, a/k/a
DENNIS KEVIN CLEARY and
JOSEPH MICHAEL TRAVIS,

Defendants-Appellants.

Nos. 89-10004, 89-10005,
89-10006 and 89-10008.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

August 11, 1989.

Before: REINHARDT, KOZINSKI and NOONAN,
Circuit Judges

Appellee's motion to dismiss these consolidated appeals for lack of jurisdiction is granted. See Midland Asphalt Corp. v. United States, 109 S. Ct. 1494 (1989); United States v. Moreno-Green, Nos. 88-1387, 88-1388, 88-1390, 88-1391, and 88-1392 Slip Op. 8559 (9th Cir. Aug. 1, 1989).

7128P

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

vs.

ROBERT SINGER, a/k/a PAUL; STEVEN MERTEN WOLOSKY, a/k/a MICHAEL WAYNE HORTON; MARK STEPHEN GAYER, a/k/a DENNIS KEVIN CLEARY and JOSEPH MICHAEL TRAVIS,

Defendants-Appellants.

Nos. 89-10004, 89-10005, 89-10006 and 89-10008.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

October 2, 1989.

Before: REINHARDT, KOZINSKI and NOONAN, Circuit Judges

Appellants' petition for rehearing is denied.

7130P

APPENDIX C

ORAL DECISION OF THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES of America,

Plaintiff,

vs.

ROBERT SINGER, JOHN CALVIN DAVIS, JOSEPH MICHAEL TRAVIS, STEVEN MARTIN WOLOSKY and MARK STEPHEN GAYOR,

Defendants.

No. CR 88-0168-CAL

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

December 21, 1988

The Court: All right. Well, this is a very interesting subject matter and --

but one I'm not prepared to pioneer and make a lot of new law on here, although the temptation to at least write on the subject is tempting.

I think we have to start fundamentally with the fact there are very sharp distinctions between the role of the grand jury and the role of this district court sitting here as a court or as a presider at a trial -- before a trial jury.

I don't think anybody has told us to be a court of appeals over what went on in the grand jury proceedings. I think also the roles of the two are much different; that is, the function of the grand jury is a finding of probable

cause, which, for analogy, I sort of liken to the prima facie case concept.

In addition, they have their own powers, and they function beyond the evidence -- or can and have the power to function beyond the evidence, and the law that is simply presented to them via the U.S. attorney or by a court.

So I just don't think that every error committed before a grand jury or by a grand juror or by the U.S. attorney in conducting or running a grand jury is reviewable.

It seems to me that the limitations on the review fall into two categories:

One is whether the error or the -- well, let's just call it error -- whether

the error actually results in any violation of constitutional rights; that is, a protection of the due process rights of the accused.

The second is sort of the court's police power to prevent governmental prosecutorial misconduct.

But that doesn't. I don't think, mean that we have the power simply to upset grand jury proceedings, dismiss indictments, where there has simply been an error. I think that error has to rise to the level of a constitutional violation or rise to the level misconduct in order for a district court to do something about it.

Now, in this case, with respect to the instructions submitted by Mr. Travis, I have some considerable question of whether the particular submitted instruction was correct under the law, and I certainly don't think it was applicable to the facts of the case with which we're dealing, even if it was, stated in the abstract, a good statement of law.

With respect to the instruction on aiding and abetting, I don't think that -- again, that the instruction was necessarily error. We may have to thresh that out here at some point when we get to trial instructions, but I don't think that instruction is on its face error.

I think also, even if it's -- I dis-

agree with it, that is, if I would agree with the defense, that instruction may be error, I certainly don't think it rises to the level of -- of conduct. I guess what I mean here is due process violation that this court can do anything about or certainly is not governmental misconduct that this court and do anything about.

With respect to the question of submitting this additional evidence to the grand jury, it just seems to me here the law is pretty well established, that the U.S. attorney has no obligation to present to the grand jury evidence, even prior testimony, I submit, which is impeaching of the witness or which is exonerating or exculpatory of the

defendant. Perhaps fairness would say otherwise.

But I think the government only has to put before the grand jury that which is -- which establishes probable cause, and the evidence can indeed be one sided. The presentation of the evidence can indeed be one sided unless it rises to this level of governmental misconduct.

So that's the process we deal with, and that certainly isn't the best in the world, but that's the way I analyze it.

So the motions to dismiss the indictment on the ground of matters occurring before the grand jury will be denied.

7131P